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When his counsel opened the case,

The *Lord Chancellor* observed,—Can you say that a witness is to be examined upon the construction of an instrument, and put in the place of the Judge and the jury? It would have been very doubtful whether he ought to have given you the usage of the trade to explain so plain a letter as this; it is a guarantee of payment; it is the solvency that is guaranteed. I think it is a short case indeed.

Dr. Lushington.—If that is your Lordship's impression, it would be in vain for me to trouble you further.

Lord Chancellor.—Yes; it is a plain del credere. You and Mr. Campbell must be both aware, that in mercantile cases—not in other cases—the learned Judges have regretted they have gone so far as putting a letter into the hands of a witness, and saying, What does it mean? The appeal must be dismissed, and with 100*l.* costs. Really the Jury Court will become a nuisance, if parties are to bring bills of exception like this. I never saw words more strongly importing del credere.

The House of Lords ordered and adjudged, That the appeal be dismissed, and the interlocutor complained of affirmed, with 100*l.* costs.

Appellant's Authorities.—Lucas v. Groning, 7 Taunton, 164; Smith v. Blandy, 1 Ryan & Moodie, 260; Philips' Law of Evidence, vol. i. 566; Bell's Principles of the Law of Scotland, 127; Thornton v. Royal Exchange Assurance Co., Peak, 25; 1 Vesey, 459; Doe v. Martin, 4 T. R. 66; Hood v. Cochrane, Jan. 1818, (F. C.)

SYDNEY S. BELL—RICHARDSON and CONNELL,—Solicitors.

No. 32. JAMES SCOTT (Lord ELIBANK'S Trustee), Appellant.—*Mr. Serjeant Spankie—Mr. Rutherford.*

JOHN ALLNUTT, Respondent.—*Mr. Hayes.*

Heritable and Moveable—Foreign.—Where part of an entailed estate was sold for redemption of the land tax, and the surplus price lodged in bank, and thereafter lent out on heritable security by the statutory trustees, and the heir apparent under the entail, during the life of the heir in possession, for onerous causes, executed in England an assignation in the English form of his right to draw the

interest thereof during his life, and after his succession granted a general disposition of all his property to a trustee for behoof of his creditors, with a special disposition of his life interest in the entailed estate on which the trustee was infeft:—Held, in a competition for the interest of the surplus price (affirming the judgment of the Court of Session), that the right to draw it was carried by the assignation, and could not be defeated by the subsequent disposition to the trustee.

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2D DIVISION.
Ld. Mackenzie.

By the statute 42 Geo. III. c. 116. for redemption of the land tax on entailed estates, it is provided that the price of the lands sold for that purpose shall be paid to a trustee (to be appointed by the Court of Session), who shall "find security to their satisfaction that the sum or sums of money to be paid to him by "the said purchaser or purchasers shall be duly and faithfully "applied in the manner and for the purposes herein-after "directed." The trustee is appointed to invest the whole price in the public funds; and after transferring what is sufficient for the redemption of the land tax, it is directed, that when there is any surplus "such surplus stock may be sold, and the money "arising therefrom be paid into or placed in one or other of the "two public banks of Scotland, with the previous authority of "the Court of Session," who are required to authorize this money to be employed, "as soon as conveniently may be," either in payment of debts affecting the entailed estate, or in the purchase of other lands to be entailed in the same manner, "and "in the meantime, till the said surplus money or balance shall "be so employed, to order and direct the money to be laid out "upon such security as to the Court shall seem proper," so that it shall be "effectual to secure to the person or persons who would "for the time have been entitled to the rents or profits of the "said manors, messuages, lands, &c., in case such sale, &c. had "not been made, and the succeeding heirs of entail who shall "respectively come to the possession of the same, the enjoyment "of the interest of the said money, and to preserve the capital "until the money shall be employed as aforesaid."

Under authority of this statute, the late Lord Elibank, in 1806, sold the farm of Redhouse, part of the entailed estate of Ballencrieff. Of the price, after redeeming the land tax, there was a surplus of 10,600*l.*, which was, in terms of the act, paid into the royal bank of Scotland by the statutory trustees, and was afterwards, by authority of the Court of Session, lent out

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on heritable security, the bonds and infeftment being taken in favour of these trustees. The greater part of it was lent to the late Sir John Lowther Johnstone. In 1816, and while it continued so vested on heritable security, the present Lord Elibank, then Alexander Murray, executed in England, in favour of John Allnutt, a domiciled Englishman, a deed according to the forms of the law of England, whereby, for a certain sum of money paid by John Allnutt, he "bargained, sold, assigned, disposed of, and "set over" all that the life estate, right, or interest, and all other the estate, right, or interest to which the said Alexander Murray, as the next heir of entail in succession after the said Alexander Lord Elibank under the aforesaid deed of entail, is entitled in reversion or remainder expectant on the decease of the said Alexander Lord Elibank, in his lifetime, and to the foresaid annual rent of 530*l.* 19*s.* to be uplifted, &c., or such other annual rent or rents, interest, income, or produce corresponding to the principal sum of 10,600*l.*, or the securities whereon it should be lent for the time, to be held for his use and benefit, with power to him, "as the attorney" of Alexander Murray, or otherwise, to demand, sue for, and recover the interest of the above principal sum, and to grant effectual discharges for the same. This assignation was intimated to the statutory trustees on the 9th of December thereafter.

On the death of Alexander Lord Elibank, in September 1820, Sir John Lowther Johnstone's trustees (he being now dead) insisted on retaining the interest against the statutory trustees, in compensation of a personal debt due to them by the present Lord Elibank; but in a multiple-poinding raised by the trustees, in which claims were lodged by the trustees of Sir John Lowther Johnstone and by John Allnutt, the latter was preferred by an interlocutor of the Lord Ordinary pronounced in 1823, which was acquiesced in. Thereafter, in 1824, Lord Elibank granted in favour of James Scott, accountant in Edinburgh, a general trust disposition for behoof of his creditors, and payment to himself of such yearly sums as his creditors might allow of all his property, and all rights belonging to him, or that might belong to him, with an obligation to execute special conveyances, if necessary; but under this declaration, "that his trust right shall not be understood or interpreted to "prefer any creditor or set of creditors to another, or postpone

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" or annul the securities or diligence of any creditors already " done or acquired; but their preferences among themselves shall " remain entire, and in the same situation in every respect as " they stood before the execution of the trust deed."

Shortly, thereafter, Lord Elibank, in implement of his obligation to grant a special conveyance, executed an ex facie absolute disposition of the entailed estate of Ballencrieff, to subsist during his Lordship's life; and on this disposition James Scott was infeft, granting at the same time a back bond declaratory of its being only in trust, and of the purposes for which the trust was granted. Scott intimated this deed to the statutory trustees on the 11th of March 1824, and insisted that he was entitled to the interest of the surplus price of the land sold for redemption of the land tax. In order to have his right ascertained, he raised, in name of the statutory trustees, a process of multiplepoinding, in which claims were lodged for him and for Allnutt under his deed of assignation.

The Lord Ordinary found, " That the claim of Mr. John " Allnutt is preferable upon the interests arising from the sum " of 10,600*l.* libelled, in so far as the said interests are in medio " in this process." His Lordship at the same time issued the subjoined note of his opinion.*

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* " The assignment of Allnutt seems sufficient as an assignation of the interests " payable to Lord Elibank by the trustees, and rents of lands to be purchased by " them. The Lord Ordinary thinks the intimation to the trustees sufficient, so far " as relates to interests, even before the succession of the present Lord Elibank, and " the after proceedings likewise seem equivalent to intimation to the trustees. The " Lord Ordinary does not think that an assignation of interests or rents needs to be " intimated every term. Holding this, then, the Lord Ordinary sees no further " question in respect to the interests which accrued before the conveyance to Mr. Scott. " In respect to the interests accruing after that conveyance, the Lord Ordinary thinks, " that if Lord Elibank had voluntarily made a conveyance to his creditors, evacuating " the right he had previously for value granted to Allnutt, this would have been very " wrong; but the Lord Ordinary is satisfied his Lordship neither intended to do nor " has done this. The proviso in the general disposition seems sufficient to exclude " this. If the assignation of interests, &c. to Allnutt had been in security of a debt, " this proviso clause must expressly have supported it against being cut down by the " conveyance to Scott, and in fair interpretation the Lord Ordinary thinks the " clause must equally support the actual assignation to Allnutt, though it gave him " right to the interest, &c. directly. But further, the Lord Ordinary does not think " that, in the circumstances of this case, there was room for evacuating Allnutt's " assignation to the interests by any right that Lord Elibank did, or indeed could at

Sept. 10, 1831. " Scott reclaimed, but the Court, on Nov. 16, 1827, adhered *, and thereafter the Lord Ordinary decerned for a specific sum in favour of Allnutt.

Scott appealed.

Appellant.—1. As the lands were sold for redemption of the land tax, the surplus price must still be considered as part of the entailed estate, and must therefore fall under the disposition to him of the lands of Ballencrieff. This being feudal, and followed by infeftment, is preferable to an assignation, unless the fund be held moveable. But it cannot be regarded as moveable; although converted into money vi statuti, it is truly real property, both in its own nature as part of, or a temporary surrogatum for, a portion of the entailed estate, and also in respect of its destination to the heirs of entail, and the object for which it was held, viz. the purchase of lands; consequently it could not be affected by a deed in the English form, which was confessedly ineffectual to convey Scotch heritage. Besides, at the date of the assignation to Allnutt, the fund was actually invested heritably; and although rights under a trust deed may be considered moveable where the trustees hold the trust estate for the purpose of selling land, this can never be so as to

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" this time grant. The Lord Ordinary understands that an assignation of rents may " be evacuated by a disposition and infeftment in the lands yielding the rents granted " to a third party; and perhaps this may hold even in the case of a disposition and " infeftment granted by and limited to the life of an heir of entail, though that seems " open to some question. But here there were, in relation to the present question, " no lands for Lord Elibank to dispone, or Mr. Scott to take infeftment in. The " lands of Redhouse had been sold, and the price was vested in judicial trustees, who " held for the purposes; first, of paying the interest to Lord Elibank till land " was acquired; second, of vesting the capital in land to be taken to the series of heirs " of entail and under the entail. Now, as to the later purpose, it does not appear to " the Lord Ordinary that Lord Elibank could convey over any right to Mr. Scott, " or to any body. The duty of the trustees still appears to remain unchanged in that " respect. They must convey the lands, not to Mr. Scott, but to the heirs of entail. " In respect of the former, the purpose of the trust was already qualified by the assig- " nation of the interests to Allnutt, and intimation thereof to the trustees, which " made it the duty of the trustees to pay those interests to Allnutt, not to Lord Eli- " bank; and after that, Lord Elibank could not dispone to Mr. Scott any right to " these interests."

* 6 Shaw and Dunlop, 62.

a fund actually heritable at the time, and vested in them for the purpose of purchasing lands. Sept. 10, 1831.

Respondent.—On the supposition that the fund is moveable,—and there can be no doubt that it was capable of transmission by assignation and intimation—but the fund, or at least the interest, does not form part of the entailed estate—it was not even in the heir of entail for the time being, but was separated from the estate by statute, and held by trustees for special purposes, the heir having nothing farther under the statute than a right to the interest accruing therefrom. Lord Elibank, therefore, did not convey this fund with the lands of Ballencrieff to the appellant. Besides, having previously conveyed to the respondent his right to draw the interest of it during his life, he cannot be presumed to intend—and it was clear from the terms of the general disposition that he did not intend—to convey to the appellant what he had previously conveyed to another. The fund in question, being actually money, cannot be regarded as heritable suâ naturâ; it is necessarily moveable; and even as to rights heritable destinatione merely, they can be transferred by deeds not probative by the law of Scotland, if in the legal form according to the country where they were executed. It is only immoveable on proper territorial subjects, which require to be transferred by deeds, and executed according to the law of the territory; and, at all events, the right possessed by the heir of entail, under the statute (which must regulate the nature of it), of drawing the interest of this money, was a moveable right transferrable by assignatur. The manner in which the fund was employed by the trustees for security could not alter its real character under the statute; besides, the respondent's right was ascertained and fixed by the decision in 1823.

The House of Lords ordered and adjudged, That the appeal be dismissed, and the interlocutor complained of be affirmed.

Appellant's Authorities.—42 Geo. 3. c. 116, sec. 63, 65, 101; Ewing, Nov. 29, 1752 (5476); Wilson, May 31, 1809 (76); Angus, Dec. 6, 1825 4 S. & D. 279); Kyle's Trustees, Nov. 14, 1827 (6 S. & D. 41); 3 Ersk. 2, sec. 10, 11, 12, 13, 14; Tait on Evidence, 57, 83, 88, 90; Voet, T. 1. L. 1. t. 4; 2 Ersk. 3, 39,

40; 2, 3; Earl of Dalkeith, Feb. 1729 (4464); Crawford, Jan. 14, 1774 (4486); Durie, Nov. 30, 1791 (4624); Ross, July 4, 1809 (F. C.); Bedwell and Yates, Dec. 2, 1819 (F. C.)

Respondent's Authorities.—3 Ersk. 2, 40; 8, 17; Falconer, Dec. 11, 1627 (4501 & 5465); Sinclair, July 16, 1636 (4501); Erskines, Dec. 15, 1664, and Scott, Nov. 28, 1676 (4502); 3 Ersk. 8, 20; Grierson, Feb. 25, 1780 (7591); Douglass, June 29, 1796 (1623); Ersk. B. 3, tit. 5; Turnbull, June 12, 1751 (871); 3 Ersk. 5, 4.

MACDOUGALL and CALENDER,—CURRIE, HORNE, and WOODGATE,—Solicitors.

No. 33.

MURDO MACKENZIE of Ardross, Appellant.—*Mr. Serjeant Spankie—Dr. Lushington.*

THOMAS HOUSTON of Creich, Respondent.—*Lord Advocate (Jeffrey)—Mr. A. M'Neill.*

Title to pursue—Jus Tertii—Salmon Fishing—Process. A party having brought an action, libelling that he was tacksman of the whole salmon fishings in a firth, and proprietor of other fishings incertain rivers flowing into it, against a proprietor of lands situated on the firth, to have it found that the defender had no right to to fish salmon ex adverso of his own lands, at which part of the river the pursuer had no right of fishing either in tack or property:—Held (affirming the judgment of the Court of Session) 1st. That although a preliminary objection to his title had been repelled, it was still competent to the defender to object to it as a title to prevail; and 2d. That the title was not sufficient to warrant his obtaining a declarator of no right of fishing against the defender.

Aug. 13, 1831.

2D DIVISION. Ld. Medwyn.

THE river Shinn in the county of Sutherland flows into the Kyle of Oykell, the upper part of the frith of Dornoch, and formed by the confluence of the Oykell, Cassley, Shinn, and Carron rivers. Mackenzie of Ardross, the proprietor of Eastern Fern and Mid Fern on the south side of the frith, raised an action of declarator and damages against Houston of Creich, a proprietor on the north side, setting forth, "That the pursuer is the "sole and exclusive proprietor of the river Shinn in the county of "Sutherland, and of the haill salmon fishings thereof, in which "the pursuer stands regularly infeft and seised in virtue of un-"questionable titles; and the pursuer is tacksman of the whole